SUSPENSION

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE

May 21, 2013

W. Craig Fugate, Administrator
Federal Emergency Management Agency
United States Department of Homeland Security
500 C Street, SW
Washington, DC 20472

Charles K. Edwards, Acting Inspector General
Office of the Inspector General
United States Department of Homeland Security
245 Murray Drive, SW, Building 410
Washington, DC 20528

Re: Erie County, NY Response to OIG Revised Audit Report OIG 13-23 (Dated March 29, 2013)

Dear Administrator Fugate and Inspector General Edwards:

On January 29, 2013, the Office of Inspector General of the US Department of Homeland Security ("OIG") issued Audit Report Number OIG 13-23 entitled "FEMA Should Recover $48 Million of Public Assistance Grants Awarded to Erie County, New York-Severe Weather-October 2006" ("OIG Audit"). On March 14, 2013, on behalf of the County, I formally replied to the OIG Audit by letter.

On April 1, 2013, the Erie County ("County") Deputy Commissioner for Emergency Services received an electronic mail message from OIG's Office of Legislative Affairs. In that e-mail, OIG notified the County and the New York State Division of Homeland Security and Emergency Services ("HSES") that OIG had amended its January 29, 2013 OIG Audit. The revised audit was dated March 29, 2013; a copy is attached for your reference ("Revised Audit"). The e-mail communication that transmitted the Revised Audit made the extraordinary request that the previously received OIG Audit be "destroyed." Such an action, among other issues, would violate New York State's Records Retention laws and policies.

First, it is my understanding that the publication of a revised audit report by a government auditor is extraordinary and rare. Government Auditing Standards (the "Yellow Book") as established by the U.S. Government Accountability Office prescribe how governmental auditors may behave and conduct audits, as well as specify how audit results are reported. The fact that OIG was compelled to issue a revised audit report two months after their original audit was publicly released is significant.

In the Revised Audit, OIG claimed that it "reissued the report to respond to a Congressional request that we clarify Erie County's selection of a local contractor that was not made within the required context of open competition regulations. This revision did not change the substance of the finding or the recommendation." That is not true and is not accurate.

In fact, OIG significantly amended the original Audit and published a Revised Audit. In so doing, OIG repudiated (without admitting so publicly) its major finding and created multiple new, heretofore previously unstated reasons and alleged factors in demanding that the County repay FEMA $39.4 million. OIG only published the Revised Audit after Erie County proved OIG was wrong on its facts and wrong on the law in the original audit.

As will be described below, Erie County:

1) Believes OIG failed to comply with the "binding nature of grant requirements" provision in Section 705(c) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") concerning Disaster Closeout Procedures (42 U.S.C. 5205);
2) Strongly disagrees with substantive allegations made in the OIG Audit and in the Revised Audit;
3) Believes auditing procedures as specified in Government Auditing Standards were not followed or completely ignored by OIG and Erie County was denied basic due process by OIG procedures;
4) Argues that based on FEMA's August 2010 response repudiating findings in a similar OIG audit of the City of Buffalo based on its response to the same storm, the County should similarly be held harmless by FEMA; and,
5) On a far more fundamental level, as explained below, Erie County believes the standards that OIG seeks to impose upon Erie County, if applied nationwide, will establish a public policy that will, in each future disaster, put the health and safety of residents of the United States in jeopardy.

Summary of Agreed Upon Facts

It is beyond any dispute that the following occurred during the response to the October 2006 storm:

- FEMA staff were from the very beginning on the scene and helped Erie County formulate and implement its response to the storm;
- The payment method that was implemented whereby a mean was determined for reimbursement was done with the full consent and knowledge of FEMA staff;
- This approach of establishing a mean was also approved and used in the City of Buffalo and based upon information and belief, continues to be an approved method for use in other emergency responses;
- FEMA agreed that there was a need to expedite the contract approval process because of the physical conditions in Erie County that were a clear and present danger to the residents and property of the county;
- Erie County staff executed the emergency response consistently with the FEMA approved plan and there was never a dispute at the time regarding implementation of the response;
- FEMA made payments under the approved contracts and none of these payments were challenged in subsequent FEMA reviews; and,

- It is not disputed by any party that the purpose of the grant was accomplished, that it was done professionally and without any allegation of malfeasance or corruption.

1) OIG Audit Reports Fail to Properly Comply with the Binding Nature of Grant Requirements Prohibition against repayment or penalty as Contained in Section 705 of the Stafford Act (42 U.S.C. 5201).

Section 705 of the Stafford Act addresses Disaster Closeout Procedures and closely prescribes FEMA's legal rights to pursue recovery of payments. Subsection (c) of Section 705 declares contracts binding and bans reimbursement to the federal government or penalties as follows:

> "(c) Binding Nature of Grant Requirements - A State or local government shall not be liable for reimbursement or any other penalty for any payment made under this Act if-
>
> (1) the payment was authorized by an approved agreement specifying the costs;
> (2) the costs were reasonable; and
> (3) the purpose of the grant was accomplished."

As specified below, all three criteria were met and satisfied. FEMA approved all payments to the County, the disaster recovery occurred, and costs were reasonable.

During and after the storm, FEMA representatives approved, obligated and closed project worksheets including estimates of and the actual cost per cubic yard of debris removed. These project worksheets and their scopes of work and actual/estimated costs are contained in the "authorized approved agreement." These costs were determined to be reasonable by FEMA during the initial drafting of the projects (in which FEMA helped design the averaging cost method) and the review of the projects by various staff within the Joint Field Office. The costs were further determined to be reasonable during final reconciliation and the County's request for final payment and the project close-out by the FEMA Regional Office. Had the costs not been reasonable, FEMA, which helped develop the methodology to determine costs, would not have approved of and paid the County's claims.

The FEMA representatives that provided such guidance included: Joseph Galinis (FEMA Public Assistance Officer for DR-1665), Edward Plasberg (FEMA Deputy Public Assistance Officer for DR-1665), and Peter Martinasco (Federal Coordinating Officer for DR-1665). In addition, Gary Shoefstall, Chief of the Buffalo District Emergency Management Office of the U.S. Army Corps of Engineers, also provided guidance. These federal officials were present at a wide variety of debris meetings that occurred shortly after the initial emergency declaration and the major declaration were announced by President George W. Bush and granted by FEMA. During these meetings the federal officials provided guidance and clarification for monitoring, contracting, costs, time and materials issues, stump removal, hanging limb removal and other matters pertaining to what would be allowed, what was not eligible, what costs would be considered reasonable, and what documentation was required.

During the October 2006 Storm recovery effort, approximately 2 million cubic yards of debris was removed. By way of comparison, recently FEMA reported that just over 5 million cubic yards of debris has been removed due to Hurricane Sandy. This comparison helps to provide some context for the magnitude of the County's work and efforts, in conjunction with FEMA and HSES, in helping local

communities to recover from the October 2006 Storm. At the end of the day, the primary purpose of the recovery was, as it always should be, to provide relief and assistance to the residents of the affected community.

Accordingly, the County believes that because the purpose of the grant was clearly accomplished, the payment(s) were authorized by an approved FEMA agreement, and the costs were reasonable; Section 705(c) forbids reimbursement by the County and recoupment by FEMA.

2) Strong disagreement with substantive allegations made in the OIG Audit and in the Revised Audit.

In the OIG Audit, OIG reported a principal finding known as Finding A. In that finding, OIG asserted that the County was required to repay the federal government $39.4 million due to a "Lack of Open and Full Contracting Competition." The OIG Audit claimed that the County violated a federal prohibition against "administratively imposed geographical preferences in the evaluation of bids" and stated that because then-County Executive Joel Giambra hired local contractors for debris removal and recovery, the County had violated federal law and regulations. The OIG Audit almost exclusively referenced the local vendor preference issue as the basis for Finding A.

In the County's March 14, 2013 written response to the original audit we pointed out in great detail the various federal laws and Congressional actions in 2006 that had amended the Stafford Act to specifically require local preference in disaster contracting, which meant that the OIG finding was erroneous.

Much to our surprise and disappointment, the Revised Audit continues to criticize the County regarding Finding A, while completely removing any references to the local preference issue which OIG had so heavily relied on in the original audit and which the County successfully rebutted. Rather than concede that they were fundamentally wrong in their finding, OIG has created new findings and allegations against the County and again, provided the audited entity with no opportunity to respond.

In the Revised Audit, Finding A asserts that Erie County "Contracting Practices did not Comply with Federal Procurement Regulations." OIG now cites new factors to criticize the County, including: (1) findings which were never discussed with the County at the August 2012 meeting, and (2) issues that were never reported in the original OIG Audit. in the Revised Audit, OIG added two pages of new findings and narrative that were not previously reported. The Revised Audit includes allegations that the County: (1) did not take necessary affirmative steps during the disaster response to hire minority, woman-owned, small, and labor surplus businesses and (2) engaged in "arbitrary actions in the procurement process."

Under OIG's latest rationale, the County would have had to take affirmative steps, when hundreds of thousands of people had lost power, lighting, and heat for days in the middle of a snowstorm, to stop and specifically and formally solicit minority, women, small, and surplus labor business enterprises to provide emergency disaster response. In the days following the storm, the County's sole imperative, like all emergency responders and as per FEMA guidelines, was to provide relief and assist the needy. Under the Revised Audit, OIG seemingly does not understand the concept of a locally and federally declared disaster and tenets of an emergency response. The practices that were followed by Erie County were known to FEMA at the time, payments were processed and made and

audits did not raise any issue regarding the use (or non-use) of minority, women, small, and surplus labor business enterprises.

3) Auditing procedures as specified in Government Auditing Standards were not followed or completely ignored by OIG and Erie County was denied basic due process by OIG procedures.

Erie County is deeply disturbed by a number of process issues that were used in the preparation of the OIG Audit and the Revised Audit. OIG failed to follow requirements contained in the Yellow Book and failed to provide the County with the basic elements of due process under the law, including making new allegations to the print media prior to advising Erie County of such new allegations and without providing Erie County an opportunity to respond.

OIG conducted a performance audit, which is subject to Government Auditing Standards. There are several pertinent sections in Chapter 7 of the Yellow Book regarding reporting standards for performance audits.

> 7.07 If, after the report is issued, the auditors discover that they did not have sufficient, appropriate evidence to support the reported findings or conclusions, they should communicate in the same manner as that used to originally distribute the report to those charged with governance, the appropriate officials of the audited entity, the appropriate officials of the organizations requiring or arranging for the audits, and other known users, so that they do not continue to rely on the findings or conclusions that were not supported. If the report was previously posted to the auditors' publicly accessible website, the auditors should remove the report and post a public notification that the report was removed. The auditors should then determine whether to conduct additional audit work necessary to reissue the report, including any revised findings or conclusions or repost the original report if the additional audit work does not result in a change in findings or conclusions.

It is our belief that upon learning from the media on February 27th or February 28th when the County held a press conference to highlight the local preference issue, or from the County's March 14th written response that Finding A in the OIG Audit was fatally flawed, OIG should have taken the necessary steps to renounce their finding and issue a corrected report stating such. However, OIG did not do so. Instead, in an interview with *the Buffalo News* published on March 4, 2013, OIG Assistant Inspector General D. Michael Beard seemed to concede that the County's defense on local preferences was correct and accurate but he then publicly suggested alternative findings including the minority business hiring allegation. It was only when *the Buffalo News* requested a comment on these new allegations did Erie County become aware that OIG had decided to add allegations not previously included in any prior audit.

Further, nearly four weeks later, OIG then issued a Revised Audit which continues to criticize the County for the same $39.4 million in questioned costs using new justifications, and OIG wrote two pages of completely new narrative to justify the same finding after their initial finding was shown by the audited entity to be wrong. They then attempted to justify the rewriting of the audit as a "congressional

request" without acknowledging the audited entity and a Member of Congress found and requested the correction of the OIG error. In this regard, we believe OIG violated Government Auditing Standard 7.07.

> 7.33 Providing a draft report with findings for review and comment by responsible officials of the audited entity and others helps the auditors develop a report that is fair, complete, and objective. Including the views of responsible officials results in a report that presents not only the auditors' findings, conclusions, and recommendations, but also the perspectives of the responsible officials of the audited entity and the corrective actions they plan to take. Obtaining the comments in writing is preferred, but oral comments are acceptable.

Under Section 7.33 of the Government Auditing Standards, OIG was required to provide a draft audit report with findings for review and comment by the County. They did not do so. Rather, at an August 2012 meeting, OIG's two field auditors disseminated a PowerPoint paper document consisting of four pages of bullet points about the October 2006 Storm. At the August 2012 meeting and between August and December 2012, County officials asked the OIG auditors about holding an exit conference and requested an opportunity to comment in writing and to see a draft audit report. OIG did not provide us with that opportunity. They finally provided us with an embargoed final audit in late January 2013 and told us that OIG would not edit the audit to allow the County an opportunity to comment in writing.

In March 2013, OIG itself edited the OIG Audit and issued a Revised Audit, and once again, did not provide the County with an opportunity to comment nor did it refer to or include the comments provided to OIG in the County's March 14, 2013 response to the OIG Audit. For this reason, we believe OIG violated Section 7.33 of Government Auditing Standards twice—in the original OIG Audit's and Revised Audit's publication.

> 7.34 When auditors receive written comments from the responsible officials, they should include in their report a copy of the officials' written comments, or a summary of the comments received. When the responsible officials provide oral comments only, auditors should prepare a summary of the oral comments and provide a copy of the summary to the responsible officials to verify that the comments are accurately stated.

In their original OIG Audit, OIG relied on oral comments made by several County employees who were interviewed during field work and OIG improperly attributed those comments as an official and final response from the County. OIG did not provide the County and its ***responsible officials*** with a genuine opportunity to provide written or oral comments. County officials coordinating the response never saw the original OIG Audit report until OIG issued it, and were then told that the County would not have an opportunity to comment, orally or otherwise. In addition, Section 7.34 states that when the audited entity's responsible officials provide oral comments, the auditors are required to prepare a summary of those comments and provide it to the responsible officials to verify the comments were accurately stated. That did not happen in this audit. The first time that any County officials saw any characterization of oral comments was in the final audit in late January 2013. For this reason, we believe OIG violated Section 7.34 of Government Auditing Standards.

> 7.37 When the audited entity's comments are inconsistent or in conflict with the findings, conclusions, or recommendations in the draft report, or when planned corrective actions do not adequately address the auditors' recommendations, the auditors should evaluate the validity of the audited entity's comments. If the auditors disagree with the comments, they should explain in the report their reasons for disagreement. *Conversely, the auditors should modify their report as necessary if they find the comments valid and supported with sufficient, appropriate evidence. (emphasis added)*

It is clear that without publicly acknowledging their error, OIG modified the original OIG Audit to delete references to local preference in Finding A in the Revised Audit. However, they then added new findings and commentary that was never discussed previously with County officials or even mentioned in the OIG Audit.

In addition, in Finding B, OIG questioned $9.03 million as unsupported costs due to the County's alleged failure to provide supporting documents. In the OIG Audit and Revised Audit, OIG described the County's response to Finding B as "The County stated that the records for projects 600, 614, 628 and 675 were lost." These two sentences do not fairly describe the County's position on Finding B and certainly has not been our position, despite OIG's assertion.

In our March 14th written response, we explained the discrepancy between what OIG requested and what the County provided in summer 2012. We stated that we had access to the documents in question and would like to provide the documentation to the appropriate federal officials. In early March 2013, OIG informed us orally that they would not accept such documentation, and that their role was completed and the audit was done. However, four weeks later OIG revised their original OIG Audit and issued the Revised Audit without giving the County an opportunity to provide any documentation or comment.

In addition to the above standards for conducting an audit that were ignored or violated by OIG, OIG staff stated to Erie County staff that Erie County was not the target of the audit, but rather, OIG was pursuing FEMA. OIG staff stated that they were conducting the audit to send a message to FEMA and to reaffirm that FEMA was spending too much money. This indicates an improper motive on the part of OIG that is unrelated to the merits of Erie County's compliance. The statement indicated that the OIG auditors had a predetermined outcome planned and intended to use Erie County as a weapon against FEMA. Thus, it was necessary for OIG to find violations by Erie County whether or not they actually existed. As it turned out, the "violations" asserted by OIG against Erie County, particularly the allegation contained in Part A of the original OIG Audit were, in fact, directly authorized and encouraged by federal law. The auditors through their comments and by the original OIG and Revised Audits have shown that they were not impartial and disinterested. They had a motive that casts a shadow over the Audits in their entirety.

Under Section 7.37 of Government Auditing Standards, DHS or OIG has a requirement to review the County's documentation regarding Finding B and, if satisfied, to modify the report. In the Revised Audit, OIG appears to have accepted the County's explanation because OIG amended recommendation #2 as follows (new OIG language is in italics):

> Recommendation #2: Disallow $9,030,634 (Federal share $6,772,976) in unsupported costs *unless the County provides adequate documentation to support these costs*. (finding B)

With regard to Finding B, Erie County has previously provided or offered to provide all records. Since OIG did not provide Erie County with an opportunity to do so during the OIG Audit or the Revised Audit, pursuant to Section 705 of the Stafford Act, Erie County believes this issue to be closed and there is no opportunity for FEMA to now seek recoupment.

Lastly, it is worth noting that in the OIG Audit and in the Revised Audit, OIG continues to erroneously state that the County is operating under a 'control period' imposed by the Erie County Fiscal Stability Authority (a State control board) starting in November 2006. That is not accurate. ECFSA ended the control period on June 2, 2009, and reaffirmed advisory status subsequently every year since. This error raises the question of the overall accuracy of OIG's findings as noted above.

4) Based on FEMA's August 2010 response repudiating findings in a similar OIG audit of the City of Buffalo regarding its response to the same storm, the County should similarly be held harmless by FEMA.

The City of Buffalo ("City") was also heavily impacted by the same surprise October 2006 storm and the City received a public assistance grant award totaling $31 million. On May 26, 2010, OIG issued an audit of the City's use of federal funds (Report Number DA-10-10). The OIG audit of the City recommended that FEMA disallow $4,351,956 awarded to the City which OIG concluded was "excessive and unsupported." In their audit, OIG made similar charges that the City should repay the federal government for allegedly excessive contract costs, unsupported labor and equipment charges and ineligible disaster charges, and excessive disaster charges.

The City disputed the findings, pointing out that all of its actions had been approved by FEMA and NYSEMO staff. The City also noted that under OIG's reasoning, the City should have waited weeks to conduct certain bidding and emergency response actions which was not reasonable—hence the definition of a federally declared disaster. Ultimately, in a written response dated August 25, 2010, FEMA repudiated most of the OIG conclusions and recommendations, noting that City staff had constantly sought and been guided by FEMA staff. The FEMA response stated:

> It is FEMA's position, based on the emergency circumstances, that the City's procurement was reasonable, necessary at the time, and compliant with FEMA regulations and grant requirements. The Code of Federal Regulations, 44 CFR 13.36(d)(4), allows flexibility in awarding grants when 'the public exigency or emergency will not permit a delay'.

In the August 2010 response to OIG, FEMA noted that the City provided information and documentation supporting the scope of work and costs to FEMA as the project worksheets were being developed, written, and approved by FEMA, and FEMA was aware of all of the City's activities. FEMA also stated that the City's project worksheets had passed through "multiple layers of FEMA review" and as such, "FEMA determined that all applicable Federal regulations and requirements were met." The FEMA regional administrator's response concluded that "due to the circumstances surrounding this

audit, I am requesting a favorable re-evaluation of the findings based on FEMA's response and eligibility determinations".

FEMA thus did not seek any major recoupment from the City of Buffalo. We contend that the situation in the County of Erie that involved the same storm, very similar responses, similar if not identical advice from the same FEMA staff, and similar results should not now lead to penalties against the County. FEMA was right when it rejected the OIG findings against the City of Buffalo and will be right again if it similarly rejects the OIG recommendations with regard to Erie County.

5) Erie County believes the standards that OIG seeks to impose upon Erie County, if applied nationwide, will establish a public policy that will, in each future disaster put the health and safety of residents of the United States in jeopardy.

The basis of OIG's most significant allegations against Erie County is that the County was wrong to accept the advice given by FEMA staff during the emergency response and should have done something else, not specified, to remain eligible for reimbursement. The basic facts are not in controversy. In the immediate aftermath of the storm, FEMA representatives came to Erie County for the express purpose of aiding in the recovery and assuring that the County would undertake its recovery and record keeping in a manner that would maximize federal assistance. The County followed the advice it received and FEMA staff were physically present at the command center throughout the immediate storm recovery period, were constantly advised of the steps being taken, and were able to observe the same. The most important evidence of this acceptance of the County's approach was the payments made by FEMA after the storm. All claims were audited at the time and in post audit reviews also. New York State HSES officials also participated in this process and fully support the County's belief that FEMA officials were aware of and accepted and approved the County's actions.

The OIG Audit and Revised Audit did not claim that Erie County had secret knowledge that it was breaking the rules, or that it should have known it was doing so. Nor is there an allegation that payments to vendors did not occur, or that contractors or subcontractors were paid for work they did not do.

The Audits essentially report that Erie County listened to the FEMA on-scene staff and that Erie County should not have done so. The penalty to the County for having listened to FEMA is massive and is being applied more than six years after the events. If Erie County, in the height of its emergency response cannot rely upon FEMA staff that was sent to Erie County for the purpose of providing such advice, what should it have done to avoid the onerous sanctions that are now being sought? The response required immediate decisive action and FEMA is the best source of information about its regulations and policies and as such, the County followed FEMA's direction.

Erie County believes that the policy of the United States should be that any community that, in good faith, follows the advice provided by authorized FEMA staff during an emergency should be properly reimbursed and subsequently be immune from a later claim for recoupment. Although in this case FEMA staff gave correct advice, this immunity should be provided even if the advice provided by FEMA is later shown to be incorrect. Any sanction or corrective action that might apply should be directed at FEMA (such as better training of FEMA staff) and not the recipients of the assistance who innocently complied with FEMA instructions. Any other policy would defeat the purpose of our

nationwide emergency response system, lead to delayed responses and in some circumstances potential loss of life, additional loss of property, and delayed physical and economic recoveries.

Conclusion

The OIG Audit and Revised Audit contain such a large number of profound factual, legal, and methodological problems dealing with material factors that both Audits should be considered tainted and unreliable in their entirety. It is particularly troublesome that while claiming Erie County failed to comply with applicable law, OIG itself has ignored:

- Applicable federal law including the 2006 amendments to the Stafford Act dealing with local hiring preference that was the central issue in the original Audit;
- The prohibition on recovery of funds also contained in the Stafford Act; and,
- The key provisions relating to the proper conduct of a governmental audit.

Additionally, it was wrong for OIG to take its new claims to *the Buffalo News* fully three weeks prior to the issuance of the Revised Audit and without providing Erie County an opportunity to reply to the allegations as provided in Government Auditing Standards. It is improper for an auditor to conduct an audit with a predetermined outcome in mind. The lack of professionalism and basic fairness by highly trained federal officials can only raise questions about the motives and standards that were in play throughout Audits.

For all these reasons, Erie County wholly rejects OIG's findings contained in the original OIG Audit and Revised Audit and respectfully requests that FEMA deny, outright, OIG's request that FEMA take action to recoup disaster relief aid provided to Erie County as a result of the October 2006 storm.

My administration is working with the local Congressional delegation, led by Senators Charles Schumer and Kirsten Gillibrand and Representative Brian Higgins and we expect to hold a meeting with them and relevant DHS officials in Washington, DC to discuss this matter.

Thank you for the opportunity to provide this response to the Revised Audit. If you have any questions, please do not hesitate to contact my office.

Sincerely yours,

Mark C. Poloncarz, Esq.
Erie County Executive

By:

Richard M. Tobe
Deputy Erie County Executive

MCP/tcc

cc: MaryAnn Tierney, Acting Regional Administrator, Federal Emergency Management Agency
D. Michael Beard, Assistant Inspector General, OEMS, US Department of Homeland Security
Honorable Charles E. Schumer, United States Senator
Honorable Senator Kirsten R. Gillibrand, United States Senator
Honorable Brian M. Higgins, United States Representative
Honorable Christopher C. Collins, United States Representative
Honorable Andrew M. Cuomo, Governor of New York
Jerome M. Hauer, Commissioner, New York State Division of Homeland Security and Emergency Services